

1 IN THE UNITED STATES DISTRICT COURT
2 IN AND FOR THE DISTRICT OF DELAWARE

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4 HELIOS SOFTWARE, LLC and PEARL : CIVIL ACTION
5 SOFTWARE, INC., :
6 :
7 Plaintiffs, :
8 v :
9 :
10 SPECTORSOFT CORP., :
11 : NO. 12-81-LPS
12 Defendant. - - -

13
14 Wilmington, Delaware
15 Tuesday, March 12, 2013
16 *Telephone Conference*

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18
19 BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J.
20

21 APPEARANCES: - - -

22
23 YOUNG CONAWAY STARGATT & TAYLOR, LLC
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and

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11 P R O C E E D I N G S

12 (REPORTER'S NOTE: The following telephone
13 conference was held in chambers, beginning at 10:43 a.m.)

14 THE COURT: Good morning, everybody. This is
15 Judge Stark. Who is there, please?

16 MR. DONNELLY: Your Honor, this is Rex Donnelly
17 with RatnerPrestia representing SpectorSoft.

18 THE COURT: Okay.

19 MR. DONNELLY: With me is James Martin from
20 Shartsis Friese.

21 MR. MARTIN: Good morning, Your Honor.

22 THE COURT: Good morning.

23 MS. KRAMAN: Good morning, Your Honor. This is
24 Pilar Kraman of Young Conaway representing the plaintiff.
25 With me on the line is Monte Squire and Cab Connor from Reed
Scardino.

THE COURT: Okay. I have my court reporter with

1 me. For the record, this is the case of Helios Software LLC
2 v SpectorSoft Corporation, our Civil Action No. 12-81-LPS.

3 We're here to discuss discovery disputes raised
4 by the defendants so we'll hear from the defendant first,
5 please.

6 MR. MARTIN: Thank you, Your Honor. This is
7 James Martin of Shartsis Frieese for SpectorSoft.

8 SpectorSoft's motion this morning involves two
9 separate parts that I'd like to discuss briefly individually.
10 The first part relates to five accused SpectorSoft products
11 and the second part involves one of plaintiffs' products.
12 And so with the Court's permission, I'd like to start with
13 the SpectorSoft products.

14 THE COURT: Yes, that is fine. But let me guide
15 you a little bit. If you could tell me, you say it's five,
16 they say it's six. I did want to hear from you on that.
17 And they also now have a proposal whereby they would agree
18 to supplement their charts, so I'm curious as to whether or
19 not that is adequate from your perspective.

20 MR. MARTIN: Thank you, Your Honor. If they
21 claim it's six, then that is their contention. One product
22 that has been accused is a product that doesn't exist, but
23 if they have infringement contentions and they believe it
24 does, we would be happy to take a look at them.

25 With respect to supplementation, I appreciate

1 the fact that they have agreed to supplement, and I
2 obviously would agree that that should happen. So the key
3 question is what should be contained in those supplemental
4 charts. So that's what I would like to address briefly this
5 morning.

6 THE COURT: Go ahead.

7 MR. MARTIN: So I think it's important to have
8 some basic context about the five different products. And
9 if there is a sixth, we can hear from plaintiffs about what
10 that product is.

11 But Spector 360, which is the first product, a
12 product for which almost all of the contentions that have
13 been provided relate, Spector 360 is a network product. It
14 has client server architecture. It's used typically by
15 businesses to monitor and record their employees' computer
16 usage. One part of the Spector 360 product is server
17 software that runs on the company servers, and the other
18 part of the 360 product is client software that runs on
19 each user's computers. Those user's computers are connected
20 to the server over a local network. So that is the basic
21 architecture of Spector 360.

22 The second product, Spector Pro, is very
23 different. It's a consumer product. It's used primarily on
24 home computers. Spector Pro does not use client server
25 architecture at all. There is no server side software.

1 It's typically used on home computers. For example, a
2 family man would install Spector Pro on a single computer to
3 record all of their children's online activities and then
4 later the parents can go to that computer or view the files
5 saved on that computer to determine what the children were
6 doing online, but there is no network component.

7 eBlaster is also a home product but it operates
8 differently than Spector Pro. Like Spector Pro, it does not
9 use client server architecture. eBlaster is installed on a
10 single computer also, but unlike Spector Pro, eBlaster
11 include functionality that will send an e-mail or a text
12 message as an alert if certain triggers occur on a computer
13 that is being monitored. And there are other differences
14 between eBlaster and Spector Pro. That software is not the
15 same. It's different software and it works in a different
16 way.

17 The fourth product, Spector CNE Investigator,
18 is a corporate enterprise product like Spector 360 but,
19 again, it's different than Spector 360 in numerous ways.
20 Its data that is sent back and forth to the server computer
21 is different. The recorder software on the two -- on the
22 user computers are different. Spector CNE offers the
23 ability to query a database of the recorded data and that
24 data is sent in a different way. It's stored in a different
25 way. And by using CNE Investigator, you can create certain

1 reports and other things that Spector 360 is not capable of
2 doing. So it's a different product. It's sold separately,
3 it's coded separately. And,

4 Finally, eBlaster Mobile is the one they added
5 for the first time when we got their claim charts. It's a
6 mobile version of eBlaster, and it employs some of the same
7 functionality where if your kids are doing something on a
8 phone, then you can get an e-mail alert or a text alert, but
9 the eBlaster Mobile doesn't run on a computer. It won't
10 work on a computer. The code is different than eBlaster,
11 and actually the functionality is, too. There is a number
12 of things that eBlaster Mobile regulates on the phone that
13 eBlaster doesn't regulate on the computer because you don't
14 make calls on a computer and you don't do the same things
15 on a computer that you do on a phone. And it's separate
16 software written by different people.

17 So I think the factual background is important
18 because each of these five accused products has been accused
19 of infringement and the infringement claims have to be
20 considered individually. If a product infringes, that
21 product must satisfy each and every element of at least one
22 of the patent claims. So if you were to take, for example,
23 claim 1 of the '237 patent, claim 1 of the '237 patent had
24 seven sub-parts, A through G. It's obvious but plaintiff
25 can't support a claim of infringement by saying claim 1(a)

1 is satisfied by Spector Pro, and claims 1(b) through (d) are
2 satisfied by Spector 360, and (e) through (g) are satisfied
3 by eBlaster. You have to have, to infringe a single
4 product, it has to satisfy each element of a patent claim.

5 Nor can the plaintiff say here is our chart for
6 Spector 360, go ahead and figure it out for Spector Pro and
7 eBlaster. You know, you should be able to determine our
8 contentions for Spector Pro and eBlaster by following the
9 same logic we used for 360.

10 But it doesn't work. I mean I asked myself why
11 have they done it this way? Why are they opposing the
12 motion? Why won't they give us separate claim charts for
13 each product individually so one chart for Spector eBlaster
14 includes only the things that are relevant to eBlaster?

15 The reason for that I believe is that if you
16 require the plaintiffs to chart each product separately, I
17 believe it becomes very clear that the products don't
18 infringe. If you look at claim 1 of the '237 patent, claim
19 1(d), for example. Claim 1(d) requires that you have a
20 communication session over a network where an access
21 configuration with control settings are exchanged. We
22 talked about this during claim construction.

23 Well, that makes no sense in the context of
24 Spector Pro or eBlaster or eBlaster Mobile because they are
25 not network products. There is no communication session

1 over a network. There is no access configuration or control
2 setting that are exchanged. The products don't have client
3 server architecture, and they can't possibly infringe this
4 patent.

5 But the plaintiff, up until this point, has
6 asserted that each and every one of the products infringes
7 each and every one of the patent claims of all three patents
8 with the exception of one claim that they acknowledge is
9 not infringed. But other than the one claim that they
10 acknowledge is not infringed, they say that every product
11 infringes every claim of each of the three patents, but
12 they've refused to explain the basis for that belief.

13 Our position has been for months now, if you
14 have a good faith basis to assert that a product infringes
15 a patent claim, then we're entitled to discover the basis
16 for that contention. And by doing it product by product, it
17 makes it impossible for them to do what they've done, which
18 is they've given us, we've acknowledged, almost 300 pages of
19 information, but most of it relates to Spector 360. And,

20 As we mentioned in footnote 2 of our letter
21 brief, if you redact the Spector 360 information, if you
22 were to put black over the parts that are screen shots and
23 information for Spector 360, there is very little and in
24 some cases absolutely no information about the other products.
25 There is nothing about eBlaster Mobile. There is very

1 little about Spector Pro and eBlaster. So for the majority
2 of the elements of each claim, the redacted charts that we
3 offered to introduce, if the Court wishes to see them, are
4 just black. There is nothing there. We don't understand
5 the basis for the claim. And, quite frankly, we can't
6 discern a good faith basis for the claim.

7 They've dressed these charts up by, in the first
8 three to five pages, they reference each of the products,
9 but then after that, in the remaining pages, there is
10 nothing said about eBlaster Mobile and there is almost
11 nothing said about the others: Spector Pro, eBlaster and
12 CNE Investigator.

13 So our position is that the plaintiffs are
14 making a very significant damages claim here, and they have
15 accused each and every product that SpectorSoft sells. And
16 at the very least, we believe they should be required to
17 disclose the basis for those claims. And we believe that
18 the applicable rules required that but when we heard that
19 they disagreed with that position, we served specific
20 interrogatory requests and they still refused to, separately
21 for each product, give us a claim chart that maps that
22 accused product on the patent claims.

23 THE COURT: All right.

24 MR. MARTIN: And whether it's five or --

25 THE COURT: And what about the timing? I

1 understand what they propose substantively sounds a little
2 bit different, but in terms of timing, they propose to
3 supplement by April 19th. What is your position on the
4 timing?

5 MR. MARTIN: Well, my position on that is we'll
6 give them however much time they need, if that is what they
7 say. But it's not fair to give us that, you know, when
8 discovery is closed. That is what they're proposing.

9 We were supposed to get these contentions months
10 ago. We're just beginning deposition discovery. Actually,
11 Mr. Squire and Mr. Connor and myself, we're all here in
12 Florida for three days of depositions of SpectorSoft employees.
13 And if they say they need until April 19th, then I think we
14 have to extend the discovery cutoff date to a month after
15 that and push the other dates accordingly because we
16 shouldn't learn the basis for their claims for the first
17 time after discovery had closed.

18 We're not saying that they can never be
19 supplemented based on additional discovery. We've never
20 said that. What we're saying is you sued us. You have
21 accused all five products or six products of infringing
22 every patent claim. You are asking us to provide responses
23 to discovery and have witnesses appear for deposition,
24 and we'll do that but we shouldn't have to do it with a
25 blindfold on. That's what effectively is happening here.

1 THE COURT: All right. Go on to the issue about
2 their product, please.

3 MR. MARTIN: Thank you, Your Honor. So this
4 part, although it receives very little real estate in the
5 briefing as a result of the page limits, this is actually
6 equally important to us.

7 To be more specific than we were in the letter
8 brief, there is one of plaintiffs' products that is relevant
9 to the second part of this motion. That product is called
10 Pearl Echo Version 4.0. This is a product that was
11 developed in the early 2000s. It's no longer on the market,
12 but if you look at the provisional application for the '237
13 patent, the only thing that was filed for that provisional
14 application were some pages and screen shots related to this
15 Pearl Echo 4.0 product.

16 So when we asked whether Pearl Echo 4.0
17 practiced the claims of each of the three patents, they said
18 it may or may not practice one or more of the claims of each
19 of the three patents. And,

20 Based on the provisional, I guess we assumed
21 that they would at least acknowledge that it practiced the
22 claims of the '237 patent, but the other two patents are
23 based on a provisional application that made no mention of
24 Pearl Echo 4.0. Those other two patents relate to a
25 provisional application where they disclose screen shots and

1 source code for Chat 911.

2 Chat 911, you may recall from the claim
3 construction hearing, is a product that was never introduced
4 to the market but it included functionality for real-time
5 monitoring of Internet sessions. This is the functionality
6 where a kid could be at a computer and there is a predator
7 and he clicks on a button and you have the real-time
8 monitoring.

9 That is what they used as their initial support
10 for the '304 and '571 patents. And we've asked them whether
11 or not Pearl Echo 4.0 is covered by either of those patents
12 and, if so, to identify the claim as well as whether Pearl
13 Echo 4.0 is covered by the '237 patent.

14 So why does this matter? Well, it matters for a
15 number of reasons, but among other things, the plaintiffs
16 developed software in 1999 called Cyber Snoop Enterprise
17 3.0. Cyber Snoop Enterprise 3.0 is prior art. The
18 plaintiffs admit that it is prior art.

19 Significantly, Cyber Snoop Enterprise 3.0 is
20 very, very similar to Pearl Echo 4.0. In fact, Pearl Echo
21 4.0 was originally called Cyber Snoop Enterprise 4.0. In
22 other words, Pearl Echo 4.0 is the new version of Cyber
23 Snoop Enterprise. There was no Pearl Echo 1.0 or 2.0 or
24 3.0. The first product that was introduced to the market as
25 Pearl Echo was originally to be named Cyber Snoop Enterprise

1 4.0 but then they changed the name to Pearl Echo 4.0 because
2 for marketing reasons, they realized Cyber Snoop had some
3 negative connotations.

4 But the point is that Cyber Snoop Enterprise 3.0
5 is prior art that was not disclosed to the PTO, and the
6 software is very similar to Pearl Echo 4.0. Plaintiffs'
7 position is that Cyber Snoop Enterprise 3.0 does not fall
8 within the scope of the patent claims. Of course that is
9 their position because if it did, those claims would be
10 invalid.

11 If they contend that Pearl Echo 4.0 falls within
12 the scope of the patent claim, we're entitled to know that.
13 And if they contend it doesn't fall within the scope of a
14 patent claim, we're entitled to know that, too. We just
15 need to know their position.

16 The Supreme Court cases from long ago say patent
17 claims are not a nose of wax. A patent owner can't say one
18 thing to obtain a patent or prove infringement and then turn
19 around and say something different to avoid invalidity.

20 And so we just need to know their position.
21 We're talking about charting one product here: Pearl Echo
22 4.0. Plaintiffs filed this case. They're seeking a
23 significant amount of monetary damages. They're seeking
24 permanent injunctive relief, they're claiming SpectorSoft
25 infringes all three patents. And, quite frankly, the

1 plaintiffs should know whether or not their own patents
2 cover their own product. And all we're asking here is to
3 discover plaintiffs' position with respect to whether 4.0,
4 Pearl Echo 4.0 practices each of the asserted claims.

5 By the way, plaintiffs picked up subsequently
6 released new versions of Pearl Echo after Version 4.0 and if
7 their position with respect to those products is the same as
8 Pearl Echo 4.0, we would agree that there is no need that
9 they need to chart those products separately. If they have
10 a position on Pearl Echo 4.0 and they say the same applies
11 to Pearl Echo 5.0 or later versions, we don't need to see
12 charts for those later versions.

13 Now, if their position is different for later
14 versions, then we should be entitled to know that, too, but
15 we're not trying to put them through a burden or make work
16 here. If 4.0 is charted and those charts would apply
17 equally with respect to whether or not the later versions
18 practice each of the patent claims, that would be fine with
19 us to get just the charts for Pearl Echo 4.0.

20 THE COURT: All right. Thank you. Let me hear
21 from the plaintiffs, please.

22 MS. KRAMAN: Thank you, Your Honor. This is
23 Pilar Kraman on behalf of plaintiff.

24 The issue with our infringement contentions I
25 guess is three things. First of all, we contend that their

1 arguments with our charts are really form over substance. We
2 have not asked them to just figure out what our contentions
3 are. We do provide nuances in our chart where we feel, where
4 our knowledge was that the products differ, but we do provide
5 substantial contentions in our chart about the accused
6 products as a group and also regarding different components,
7 SpectorSoft components that apply across the product, like
8 their client software and server software. Our understanding
9 of some of the differences and the facts about the products
10 are a little different than what Mr. Martin said today, and
11 discovery will sort that out.

12 Our expert began review of the source code last
13 week. That is continuing. As Mr. Martin said, some of the
14 depositions of SpectorSoft are happening this week. Yet
15 these 30(b)(6) depositions won't be happening until likely
16 April. All of those things are underway.

17 We provided a significant amount of detail about
18 what infringes and how. We haven't heard any complaints
19 regarding our contentions that the specific contentions
20 themselves are wrong or even incomplete, and SpectorSoft
21 never even mentioned the fact that we do provide contentions
22 related to the products as a group or citing to SpectorSoft
23 components that are common across the product.

24 So we think that the busy work of converting
25 three claim charts that are patent by patent, which is a

1 very common way to provide claim charts, to convert those
2 into 18 claim charts is unduly burdensome and unnecessary
3 under the rules or the law in this District.

4 THE COURT: Well, let me just stop you there
5 because I understand you think it's make work, but defendant
6 insists that if you really break things down, you are going
7 to see that there are plenty of holes and deficiencies for
8 some of the products in what you have charted.

9 How much of a burden would it be? It seems to
10 me you have already done the work, and why not just have you
11 all literally on the same page and you will all be able to
12 see whether there are holes or not?

13 MS. KRAMAN: Well, like I mentioned, the
14 contentions themselves contain contentions as to the accused
15 products as a group. One thing that I want to make clear,
16 too, is that when we served our contentions on December 18th,
17 we didn't have -- we had about 8,000 pages of core technical
18 documents that the defendants produced. They produced, I
19 noted in the letter, 250,000 pages, but of that, they produced
20 documents natively. They actually produced 250,000 documents
21 on the 19th and 20th and we're going through that.

22 They asked us, when they initially raised this,
23 they asked us to cut and paste. In our view, meaningful
24 supplementation would be more worthy of the time it would
25 take to do that. And we definitely intend to supplement.

1 As we noted in our letter, as the source code
2 review is underway now and the depositions are going forward,
3 those are certainly going to inform our contentions, and if it
4 is the case that we see that there is holes, we'll see that.
5 But as of right now, that is not our understanding of how
6 the products function, and that the different features and
7 functionality that SpectorSoft mentions, that may not matter
8 in terms of infringement. They could still infringe much
9 in the same way despite having different features and
10 functionality.

11 THE COURT: All right. And you say you want
12 until April 19th to do whatever supplementation is ordered.
13 Shouldn't we go ahead, if we agree to that, and extend fact
14 discovery then?

15 MS. KRAMAN: The parties are actually meeting
16 and conferring on that right now and actually agreeing to
17 extend fact discovery until April 19th because deposition
18 scheduling needs to accommodate schedules. Some depositions
19 need to occur in April. So the parties are working on that
20 now anyway, talking about extending.

21 Looking at the schedule, the schedule is somewhat
22 tight to still have our trial go forward. The schedule looks
23 like there is enough wiggle room that we could extend it three
24 weeks, and that is what the parties are working on.

25 THE COURT: What about an opportunity for

1 defendants to take discovery after you served your
2 supplemental infringement charts?

3 MS. KRAMAN: It's not clear to us what discovery
4 that they would be able to take. They have designated --
5 virtually all of their production is highly confidential, so
6 no witnesses of plaintiff have been able to see anything.
7 And since contention depositions generally aren't prohibited
8 in this District, we're not sure what supplemental discovery
9 they would take.

10 MR. MARTIN: Your Honor, may I respond to that
11 briefly?

12 THE COURT: You will get a chance at the end.

13 MR. MARTIN: Thank you.

14 THE COURT: All right. Ms. Kraman, address the
15 request that you chart your own products that you contend
16 practice your patents.

17 MS. KRAMAN: Well, the interrogatory that
18 SpectorSoft served is virtually identical to the interrogatory
19 that was served in *Leader v Facebook*. It doesn't ask -- what
20 Mr. Martin said today is not what the interrogatory asked.
21 The interrogatory asks us to provide our contention or it asks
22 us to chart -- I'll give you the exact language.

23 They ask us to serve a chart showing how our
24 products practice the elements of the patent in suit. That
25 is the question that they're asking which is identical to

1 the interrogatory in *Leader v Facebook*. And, in our
2 opinion, they haven't sufficiently identified the relevance
3 of asking us to do that. And that aside, we have provided
4 them sufficient discovery on their request.

5 They asked a similar interrogatory.
6 Interrogatory No. 2 asked us to identify the products. We
7 gave them those products. We gave them detailed information
8 about the products in response to Interrogatories 2 and 3.
9 We also produced source code and we produced the executables
10 to the defendant for all of our products.

11 THE COURT: Have you --

12 MS. KRAMAN: In addition --

13 THE COURT: Have you advised them which products
14 of yours practice which claims of which patents?

15 MS. KRAMAN: We haven't specified the specific
16 claims in response to that interrogatory, but SpectorSoft
17 deposed two of our witnesses last week. One was an
18 inventor, one of the inventors, who was not a 30(b)(6)
19 witness but they deposed him at length on this issue. They
20 went claim by claim through each of the patents, asking
21 questions about our products.

22 They also deposed our 30(b)(6) witness for nearly
23 16 hours asking the same question. And at that point, even
24 though we had produced the source code, they never looked at
25 it.

1 THE COURT: But don't you at some point, if you
2 are going to continue to take the position that you have
3 products that practice your patent, you are going to have to
4 tell us which products practice which patent claims, aren't
5 you?

6 MS. KRAMAN: Well, I agree. And I think that
7 that they got that, what they were looking for through the
8 deposition testimony last week ad nauseam. I mean literally
9 one of our deponents, he testified for over 16 hours last
10 week. They asked question after question regarding every
11 claim in our products.

12 THE COURT: All right. So why shouldn't I make
13 you at least put in an interrogatory? It is that I guess
14 you think you substantively disclosed but put it in a
15 response to an interrogatory so we all know going forward
16 this is the position of the plaintiffs with respect to which
17 products we have that practice which patent claims.

18 MS. KRAMAN: We can do that, but we don't think
19 that producing claim charts would be appropriate. We think
20 that would be unduly burdensome. That is essentially what
21 SpectorSoft is asking for, our claim charts.

22 THE COURT: You are seeking injunctive relief;
23 correct?

24 MS. KRAMAN: Correct.

25 THE COURT: Was there anything else you wanted

1 to address?

2 MS. KRAMAN: One point that I wanted to make,
3 just a quick point, is regarding their claim of prejudice
4 based on our infringement contention, and in our proposal we
5 also proposed giving SpectorSoft time after the close of
6 fact discovery to serve noninfringement contentions which
7 they haven't served to us in the first instance. So I think
8 their claims of prejudice are somewhat disingenuous because
9 they don't complain at all for the most part about our claim
10 chart for the '571 patent, yet we've gotten no noninfringement
11 contentions on those. They seem to agree our contentions
12 are sufficient for SpectorSoft 360 for all patents and they
13 haven't provided noninfringement contentions for those. So
14 our proposal would give them, you know, to make contentions
15 which is after the close of fact discovery but before opening
16 expert reports are due to serve their noninfringement
17 contentions.

18 THE COURT: Okay. Thank you very much.

19 Mr. Martin, you can respond.

20 MR. MARTIN: Thank you, Your Honor. There
21 were a number of different things that factually I would
22 vehemently disagree with, but I think it's probably more
23 productive to focus instead on what I guess we're asking for
24 with specificity. And if the Court would like me to respond
25 to any of those factual statements that have been made, I'd

1 be happy to do so. I can spend 15 minutes on it now but I'm
2 not sure that's the productive way to spend our time.

3 With respect to the first part of the motion,
4 we would like to have a date certain, April 19th would be
5 fine, by which we get the claim charts. The form of those
6 claim charts should be each product individually. Those
7 claim charts should reference the documents that they're
8 citing to.

9 Here, although they acknowledge that they had
10 8,000 pages of documents when they provided their initial
11 chart and have 250,000 documents or pages now, those charts
12 don't reference a single document that was produced in
13 discovery. Not one. They only reference the things that they
14 pulled from the publicly available website and presumably
15 those documents were available -- well, they were available
16 prior to filing suit and presumably that's the basis for the
17 claims.

18 So in these charts, they should reference the
19 documents that they're including. We shouldn't have to play
20 this game of hide and seek to try to understand what they're
21 claiming. The initial schedule provided for claim charts in
22 December. Actually, earlier than that. We extended the
23 date until December. And the initial discovery cutoff date
24 was the end of March.

25 It's fundamentally unfair for to require us to

1 put up 30(b)(6) witnesses or other witnesses in discovery
2 without knowing even the basis for their claims, not even
3 the most basic information about how they contend certain
4 products infringe. And we're supposed to put a witness up
5 as the person most knowledgeable on noninfringement? Well,
6 it's really difficult to do that and it feels like they're
7 hiding the ball here.

8 The expert reports are a really significant
9 issue. We shouldn't have to have our expert wait until
10 April 19th and then have to produce a report, scrambling
11 at the last minute because we had no idea what their
12 infringement claims are. We need to have adequate time
13 after receiving those to review them and analyze them,
14 consider their claims. Maybe they have a good faith basis
15 that we just can't conceive of, but we need time to
16 understand them, respond to them, and then prepare expert
17 reports based on them.

18 Obviously, the position that the plaintiffs take
19 for infringement should be consistent with the construction
20 of the claims for purposes of invalidity. So our invalidity
21 contention depends on understanding how they're alleging
22 infringement. And I recognize that Your Honor hasn't seen the
23 facts here yet but it's going to be really, really hard for
24 the plaintiffs to allege that SpectorSoft's products infringe
25 and somehow say that Cyber Snoop Enterprise 3.0 does not,

1 because if you apply a standard to SpectorSoft's product and
2 you apply the same standard to Cyber Snoop Enterprise 3.0, you
3 are going to see the position the plaintiffs are taking is
4 necessarily inconsistent. If we infringe, their patent is
5 invalid. We don't think we infringe.

6 So I guess April 19th is fine but we have to set
7 a fact discovery cutoff date that gives us time to put up
8 witnesses after that date who are prepared for deposition
9 and to have experts receive those contentions and prepare
10 our reports. I'm not necessarily saying that we need as
11 much time as was originally provided, but we need a couple
12 months. Otherwise, we're fighting with one hand tied behind
13 our back.

14 With respect to the second part of the motion, I
15 would agree, as I said earlier, that if the plaintiffs tell
16 us which products practice each claim of each patent, that
17 probably is sufficient provided that they chart Pearl Echo
18 4.0. I recognize that the initial interrogatory was worded
19 more broadly and they were willing to meet and confer, but
20 to simply say that one or more products may or may not
21 practice one or more claims of each of the three patents is
22 not sufficient.

23 And with respect to Pearl Echo 4.0, we're really
24 entitled to understand whether or not they say that that
25 product practices each claim of each patent. If they say it

1 doesn't, maybe they shouldn't have to chart it. That's
2 fine. But if they say that it does, if they say that, for
3 example, that product practices the '571, the real-time
4 patent, which I can't even understand how they could take
5 that position, I'd like to understand how they take that
6 position because that is the same reason I can't understand
7 how they can allege that we infringe. There is nothing even
8 close to real-time, but they say we infringe. And if we
9 infringe, then Pearl Echo 4.0 probably practices that patent
10 claim under the same explanation, and we're entitled to
11 understand that if that is their position.

12 Maybe they say there are differences. I can't
13 read their minds. But clearly they have experts that have
14 been working on their side, and they're aware of these
15 issues just as we are, and they know their position and
16 unfortunately we don't.

17 THE COURT: What about your noninfringement
18 contentions?

19 MR. MARTIN: We're happy to provide
20 non-infringement contentions. We've never taken a position
21 that we wouldn't. As I said earlier, I think that we should
22 see their infringement contentions first so we can respond
23 to them.

24 THE COURT: Are you willing to provide the same
25 level of detail in your charts that you are asking me to

1 order them to do in their supplemental infringement chart?

2 MR. MARTIN: Absolutely. I think it's going to
3 make everything in this case after that point be more
4 efficient, including summary judgment.

5 THE COURT: And how much time do you need after
6 you get their supplemental infringement charts?

7 MR. MARTIN: Well, I haven't looked at what the
8 original schedule provided, but six weeks seems like that
9 would be enough time.

10 THE COURT: All right. Is there anything else
11 you wanted to add, Mr. Martin?

12 MR. MARTIN: No, other than to say we don't, for
13 a minute, believe that the charts that have been provided
14 are sufficient for 360 or any other product, but they are
15 what they are. They provided 300 pages, and if that is
16 their contentions, we'll accept them. We're just trying to
17 get their basic position. Whether or not we agree with it
18 is a different issue.

19 THE COURT: All right. Well, you are going to
20 get more. Let me give you my rulings here.

21 First, with respect to the request for the
22 plaintiffs to serve supplemental infringement charts, I'm
23 granting that request. I largely agree with the argument
24 made by the defendant here, so the supplemental infringement
25 charts have to be meaningful supplementation.

1 In the context of this case, that shall include
2 a separate chart for each product that the plaintiffs are
3 accusing of infringement for each patent. So I recognize
4 that may mean 15 or 18 charts, I'm not quite sure of the
5 math there, but I don't think it is just make work. I think
6 it is an exercise that at some conceptual level both sides
7 need to go through in any event. While it will be quite a
8 lot of pages, it will allow both sides to know exactly what
9 is being contended by the plaintiffs and perhaps may reveal
10 some holes in the whole infringement case with respect to
11 some of the patents and some of the products. We will see.

12 But in any event, defendant is entitled to
13 know with particularity what the plaintiffs' infringement
14 contentions are, and there need be reference to specific
15 documents as well. We have, and will have, reached the time
16 in this case where that is appropriate under the circumstances
17 here.

18 The defendant doesn't oppose the plaintiffs'
19 proposed date of April 19th so this supplementation I order
20 to be done by April 19th.

21 In terms of the second part of the request, I'm
22 largely granting the relief sought by the defendant there
23 as well. Specifically, the plaintiffs need to supplement
24 their response to the interrogatory to advise the defendant
25 specifically of which products the plaintiffs sell or have

1 sold that they contend practice any of the claims of any of
2 the patents, and they need to identify specifically which
3 claims of which patents for which products. And,

4 On top of that, I am going to go ahead and do
5 hereby order that the plaintiffs also provide a chart with
6 respect to the Pearl Echo 4.0 product, provide a chart for
7 any of the claims of any of the patents that the plaintiffs
8 contend the Pearl Echo 4.0 product practices. Under the
9 circumstances here, including the arguable relationship
10 between the Pearl Echo 4.0 product and what is agreed to
11 be prior art and also, of course, given the plaintiffs'
12 request for injunctive relief, I believe in this case it is
13 appropriate for the plaintiff to have to do this.

14 I understand there was a ruling in my *Leader v*
15 *Facebook* case that some may think is in some tension with
16 today's ruling. On that, I'll say, first, of course, that
17 was a different case but, second, I believe in that case
18 the plaintiffs had already at least provided a lot of the
19 information that I'm ordering the plaintiffs here to give
20 specifically linking the product, their own product to
21 specific claims of their own patents. But be that as it may
22 be, under the circumstances here, you have my ruling in this
23 case.

24 I am also going to order and do hereby order
25 that the defendant serve its very meaningful noninfringement

1 contentions by the date the plaintiffs have proposed which is
2 May 10th. Those contentions by the defendant shall be at the
3 same level of detail that I have ordered for the plaintiffs'
4 supplemental infringement contentions, including, of course,
5 specific references to documents that have been produced in
6 discovery to that point.

7 I understand the parties are talking about
8 additional time for fact discovery. We'll see where that
9 leads. My guess is if you are all agreeable to some
10 extensions, I will probably agree to it as well.

11 To the extent the defendants are asking me to
12 extend fact discovery for them in light of my other rulings
13 today, that request is denied without prejudice to the
14 defendant's ability to return if they think that your
15 meeting and conferring does not give you the additional
16 discovery that you think you are entitled to, including
17 discovery after the service of the supplemental infringement
18 contentions.

19 I don't have time for more argument but I want
20 to make sure I am clear in what I have ruled. Are there any
21 questions, Mr. Martin?

22 MR. MARTIN: No, Your Honor. I think I
23 understand that. Thank you very much.

24 THE COURT: Okay. Ms. Kraman, are there any
25 questions?

1 MS. KRAMAN: No. Thank you, Your Honor.

2 THE COURT: Thank you all very much.

3 MR. SQUIRE: Your Honor, I'm sorry. This is
4 Monte Squire. I want to get one other thing to the record
5 and I will be very brief.

6 There was mention of agreed upon prior art that
7 was represented by the other side. There is no agreement
8 about what is or what is not prior art.

9 THE COURT: Okay. I appreciate you noting that,
10 and you are right. I hadn't actually gotten your position
11 on that, but it doesn't affect my ruling. I understand the
12 argument that the Cyber Snoop 3.0 is prior art. If it's not
13 agreed upon, it's not agreed upon, but I still have the same
14 ruling. I appreciate you noting that.

15 Is there anything else, Mr. Squire?

16 MR. SQUIRE: No. Thank you, Your Honor.

17 THE COURT: Thank you all very much. Good-bye.

18 (Telephone conference ends at 11:27 a.m.)

19

20 I hereby certify the foregoing is a true and accurate
21 transcript from my stenographic notes in the proceeding.

22

23 /s/ Brian P. Gaffigan
24 Official Court Reporter
25 U.S. District Court